Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
RURAL CELLULAR ASSOCIATION	)	RM -11497
	)	
Petition for Rulemaking Regarding	)	
Exclusivity Arrangements Between	)	
Commercial Wireless Carriers and	)	
Handset Manufacturers	)	

To: The Commission

COMMENTS OF THE SOUTH DAKOTA TELECOMMUNICATIONS ASSOCIATION

South Dakota Telecommunications Association ("SDTA"), by its attorneys, respectfully submits its comments in the above-captioned proceeding. SDTA urges the Commission to initiate a rulemaking to address the issues raised by the Rural Cellular Association ("RCA") in its May 20, 2008 Petition for Rulemaking regarding exclusivity arrangements between commercial wireless carriers and handset manufacturers (the "RCA Handset Exclusivity Petition" or "Petition").

In particular, SDTA believes that rural citizens should not be deprived of handset choices in violation of the Communications Act of 1934, as amended (the "Act"). Handset exclusivity arrangements threaten the ability of Tier II and Tier III wireless carriers to compete effectively with nationwide carriers and the availability of service in remote and sparsely populated areas that are not adequately served by the nationwide carriers. Moreover, allowing exclusive arrangements between nationwide carriers and handset manufacturers may jeopardize the ability of Tier II and Tier III wireless carriers to obtain an adequate selection or supply of the devices they need to achieve compliance with FCC regulatory mandates such as hearing aid compatibility ("HAC"). The

Commission had an opportunity to act on this issue in the context of the Verizon Wireless – ALLTEL merger and it chose not to do so. With the Commission's consent to this proposed transaction, the so-called "Big 5" carriers – *i.e.*, AT&T, Verizon Wireless, Sprint Nextel, T-Mobile and Alltel – are now the "Even Bigger 4" and the competitive gap between these nationwide behemoths and the rest of the wireless industry (especially the small and independent wireless carriers that serve rural America) has only grown larger. Accordingly, SDTA agrees that the time is ripe for the Commission to initiate a formal investigation into the use and anticompetitive impact of handset exclusivity arrangements by the nation's largest wireless carriers, and the extent to which such arrangements are encouraged or tacitly endorsed by handset manufacturers. The Commission should not hesitate to exercise its authority under the Act to prohibit these arrangements when they are found to be contrary to the public interest.[1] In support whereof, the following is shown:

I. Statement of Interest

SDTA represents the interests of 33 independent, cooperative and municipal local exchange carriers ("LECs") in the State of South Dakota. A list of SDTA member carriers is included as Attachment A hereto. All of the SDTA member LECs are "rural telephone companies" as defined in 47 U.S.C. §153(37) and all have been designated as "eligible telecommunications carriers" (or "ETCs") within their established study areas. The SDTA member companies all serve primarily high-cost areas. Most of them hold a direct or indirect interest in spectrum licenses; and have implemented, or are in the process of implementing, wireless service offerings for the rural communities they serve.

[1] The Petition (at pp. 10-12) correctly sets forth the Commission's authority to police handset exclusivity practices.

II. Rural Citizens Should Not Be Deprived of Handset Choices in Violation of the Communications Act.

As RCA has shown, many of the newest and most innovative devices are only available to customers of nationwide wireless service providers, and customers are being "channeled" to a particular nationwide carrier's service based on that carrier's "stranglehold" over the desired handset.[2] In contrast, customers of smaller and rural service providers often have only a limited selection of basic, low-end handsets, or models that larger carriers have already discontinued.

RCA cites several recent examples where the real or perceived benefits of the most sought-after devices – *i.e.*, unique products for which there are no readily available substitutes – are not available to rural consumers because the carrier with an exclusive arrangement for that device does not provide service in their area and enforces limits on roaming. Most recently, representatives of Sprint Nextel acknowledged that the company's poor earnings in the 3rd Quarter of 2008 – and significant loss of customers - were due in large part to the strong appeal of other carriers' exclusive handsets.[3] And this came in spite of Sprint's own exclusive partnership with Samsung for the Instinct touch-screen phone, which features Internet applications much like other exclusive phones. Rural carriers have access to neither of these devices, and are finding it increasingly difficult to maintain customer loyalty based on their superior local service alone.

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[2] Examples include the Apple iPhone (AT&T), LG Voyager (Verizon), Samsung Ace (Sprint), and RIM Blackberry Bold (AT&T).

[3] *See* Cecilia Kang, Sprint Swings to Loss as Customers Flee, Washington Post, Nov. 8, 2008 at Pg. D01. http://www.washingtonpost.com/wp-dyn/content/article/2008/11/07/AR2008110701159.html

SDTA agrees with RCA that handset exclusivity arrangements are inconsistent with the Commission's obligations under the Act to make wire and radio communication service available to all the people of the United States, without discrimination, and to ensure "a fair, efficient and equitable distribution of radio service" to all states.[4]

III. The Availability of Wireless Service in Remote Areas Will Be Jeopardized if Rural Carriers Cannot Compete Effectively with Nationwide Providers.

It stands to reason that the quality of rural networks, and availability of wireless services in the most remote areas, will be jeopardized if rural wireless carriers are unable to compete effectively with the four giant nationwide carriers. Revenues from a fixed base of local subscribers – in addition to revenues from roaming customers – are vital to the financial stability of any wireless carrier. For many rural carriers, it would be impossible to survive, much less to thrive and expand service into new and unserved (or underserved) territories, if there is significant customer churn. Therefore, as these dominant carriers acquire competitors and extend their service into smaller markets and the connecting interstate highways, rural carriers are more likely to be harmed by the anticompetitive effects of wireless handset exclusivity arrangements.

If smaller rural carriers are forced out of business by the loss of customers in the few populated portions of their service areas (a reality that is growing more possible in today's fragile economy), many of the most remote areas will lose access to any type of wireless service. The larger carriers generally have not built out coverage to many small communities and truly rural stretches that are removed from the highway. The resulting net loss of service to rural America would be contrary to public interest and policies

[4] *See* RCA Handset Exclusivity Petition at pp. 5-6 (citing Section 1 and Section 307(b) of the Act).

embodied in the Communications Act.

IV. Handset Exclusivity Arrangements Threaten the Variety and Availability of Devices that Tier II and Tier III Wireless Carriers Need to Comply with the FCC's Regulatory Mandates.

In addition to the harms that handset exclusivity arrangements inflict on consumer choice and the ability of rural and regional carriers to compete in the marketplace, these arrangements also threaten the ability of Tier II and Tier III Wireless Carriers to secure an adequate supply, and variety, of the latest phones and devices that meet the Commission's safety-related mandates such as hearing aid compatibility and E911.

As SDTA noted in its petition in the Verizon-Alltel merger proceeding,[5] the typical handset issue occurs where a national carrier enters into an exclusivity agreement for a specific handset line or a series of handsets. Available information indicates that in many instances, the big carrier has not consumed the resulting exclusive supply. The result of the exclusivity arrangement is that small and rural carriers are unable to obtain high quality, technologically sophisticated handsets to offer to their customers. The Commission's recent HAC orders reflect that there are carriers who are struggling to obtain handsets in models and in quantities necessary to operate their businesses.[6] This problem is due in large part to the dynamic of exclusive handset arrangements and locked handsets.

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[5] See SDTA's August 11, 2008 Petition to Condition Transaction Approval, WT Docket No. 08-95, FCC ULS File Nos. 0003463892, *et al*., at p. 15.

[6] The Commission acknowledged in its HAC proceeding (WT Docket No. 01-309) that, "[i]n contrast to large carriers, smaller wireless carriers may be disadvantaged when they seek to acquire … specialized handsets" because vendors treat the largest carriers, who place the largest orders for equipment, as priority customers. *See Hearing Aid Compatibility Reconsideration Order*, 20 FCC Rcd at 11233 ¶ 22, citing *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14846-47 ¶ 20.

RCA notes that the nationwide carriers have argued in other contexts that they must enter into handset exclusivity arrangements to distinguish themselves in the marketplace, and to spur technology development. However, these arguments lack merit. If a handset manufacturer wished to stay profitable and competitive, it will develop and market new technologies and features; and while an exclusivity deal may allow a carrier to “distinguish itself in the marketplace,” it does so by creating an artificial monopoly over a consumer device. When consumers are required to purchase wireless service from that carrier just so that they can obtain that device, it has the impact of a tying arrangement.

Antitrust law has long recognized that tying arrangements can be harmful to consumers, and must be carefully evaluated for anticompetitive impact. While the law regarding tying arrangements is evolving in the case of certain intellectual property rights, it is still grounded in evaluating the harmful impact on consumers and competition, through inquiries such as "why are you doing this; what are the efficiencies, are there other ways to achieve the efficiencies; do you expect it to block competition?"[7] In the case of exclusive handset arrangements, it is respectfully submitted that competition is blocked and consumers (especially those living in rural areas) are harmed. This outcome goes against the Commission’s recent efforts to foster open access in technologies and service offerings.

Moreover, as pointed out in the December 2, 2008 comments of Corr Wireless Communications, LLC (at p. 3), handset exclusivity arrangements and/or favored

[7] See Antitrust Issues in the Tying and Bundling of Intellectual Property Rights, which can be viewed at: http://www.usdoj.gov/atr/public/hearings/ip/chapter_5.htm.

customer arrangements are likely to delay the ability of small and rural carriers to acquire Assisted GPS ("APCS") handsets, thereby depriving these carriers and their subscribers of a potentially important solution for rural E911 deployment. SDTA agrees with Corr Wireless that any Notice of Proposed Rulemaking issued in this proceeding should be broad enough to examine not only exclusivity arrangements, but also most favored customer arrangements that have resulted in a mere trickle of compliant handsets making their way to rural carriers.

CONCLUSION

SDTA agrees with RCA that it is time for the Commission to conduct a rulemaking to investigate the widespread use and anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers, and, as necessary, it should adopt rules that prohibit such arrangements when contrary to the public interest. The Commission has ample authority to address discriminatory and anticompetitive practices under the Communications Act, and now is the time to do so.

The Commission had an opportunity to address the handset exclusivity issue in the context of the Verizon-Alltel merger, at the request of the SDTA[8] and others, but chose not to do so. Now, the combined Verizon-Alltel will be able to exert even more leverage on handset manufacturers, to the detriment of rural consumers. Accordingly, SDTA joins RCA in urging the Commission not to delay and initiate a rulemaking to investigate these harmful and unreasonable practices.

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[8] See SDTA's August 11, 2008 Petition to Condition Transaction Approval, *supra* at pp. 15-16.

Respectfully Submitted,

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Attachment A

South Dakota Telecommunications Association Member Carriers

Alliance Communications Cooperative
Armour Independent Telephone (A Golden West Company)
Beresford Municipal Telephone Company
Bridgewater Canistota Telephone (A Golden West Company)
Brookings Municipal Utilities d/b/a Swiftel Communications
Cheyenne River Sioux Tribal Telephone Authority
Faith Municipal Telephone Company
Fort Randall Telephone
Golden West Telecommunications Cooperative
Hills Telephone Company (An Alliance Company)
Interstate Telecommunications Cooperative
James Valley Telecommunications
Kadoka Telephone Co. (A Golden West Company)
Kennebec Telephone Company
Knology (incumbent South Dakota LEC operations)
Long Lines
McCook Cooperative Telephone
Midstate Communications
Mount Rushmore Telephone
RC Communications (A Roberts County Telephone Company)
Roberts County Telephone Cooperative
Santel Communications Cooperative
Sioux Valley Telephone (A Golden West Company)
Splitrock Properties (An Alliance Company)
Stockholm-Strandburg Telephone Co. (An Interstate Company)
Tri-County Telcom, Inc. (A McCook Cooperative Company)
Union Telephone (A Golden West Company)
Valley Telecommunications Cooperative
Venture Communications Cooperative
Vivian Telephone Co. (A Golden West Company)
West River Cooperative Telephone
West River Telecommunications Cooperative
Western Telephone Company

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